A **LAM KAM WING v. KETUA PENGARAH HASIL DALAM NEGERI**

COURT OF APPEAL, PUTRAJAYA
AHMAD ZAIDI IBRAHIM JCA
MOHAMED ZAINI MAZLAN JCA
ALWI ABDUL WAHAB JCA
B [CIVIL APPEAL NO: Q-10(A)-461-06-2022]
23 MAY 2025

Abstract – *(i) For the purpose of tax exemptions under para. 2 of the Exemption Order 2009, an employee is deemed to have 'control' over a company, and thus not qualified for the exemption, if they are the largest single shareholder, even if their percentage of shares is less than 50%, because 'control' under s. 139 of the Income Tax Act 1967 ('Act') turns on comparative, not absolute ownership; (ii) A penalty under s. 113(2) of the Act, for submitting an incorrect tax return, should not be imposed if the taxpayer's failure to declare income tax was based on a bona fide, albeit incorrect, interpretation of a tax exemption provision, without any intent to deceive or conceal. In such circumstances, the Inland Revenue Board has a duty to exercise its discretion to remit the penalty under s. 124(3) of the Act.*

REVENUE LAW: *Income tax – Additional assessment – Managing director ('MD') of company held 30% of shares – MD provided with annual allowances – Company had not included MD's allowances in scheduled tax return – Whether allowances exempt from income tax – Whether para. 2 of Income Tax (Exemption) Order 2009 applied to company – Whether MD had control over company through ownership of shares – Income Tax Act 1967, s. 139(1)(b)*

REVENUE LAW: *Income tax – Penalties – Managing director ('MD') of company held 30% of shares – MD provided with annual allowances – Company under impression that allowances exempt from income tax pursuant to para. 2 of Income Tax (Exemption) Order 2009 – Company had not included MD's allowances in scheduled tax return – Company imposed with 45% penalty – Whether company intended to deceive and conceal by failing to declare allowances – Whether company's conduct bona fide – Whether imposition of penalties justified – Income Tax Act 1967, ss. 113(2)*

The appellant was the managing director of a company which had an issued paid-up capital of 10,000 unit of shares; the appellant held 3,000 (30%) of these shares. The company provided the appellant with annual allowances amounting to RM14,400 ('allowances'). In 2014, following an audit, the respondent discovered that the company had not included the appellant's allowances in the scheduled tax return. The appellant, however, contended that these allowances were exempt from income tax, pursuant to para. 2 of the Income Tax (Exemption) Order 2009 ('EO'). The respondent disagreed

and asserted that the EO did not apply to the appellant. The respondent proceeded to issue additional assessment notices for the assessment years 2011 and 2012 and the additional tax payable by the appellant was RM5,011.20 for each assessment year, including a 45% penalty imposed under s. 113(2) of the Income Tax Act 1967 ('Act'). The appellant's appeal to the Special Commissioners of Income Tax ('SCIT') bore no success; it was determined by the SCIT that, *inter alia*, (i) although allowances received by the appellant were generally exempt under the EO, the appellant did not qualify for this exemption as he was subject to para. 3(a) of the EO, which stated that the exemption did not apply to employees who had control over their employer through ownership of shares in the company; and (ii) the respondent had the authority to impose penalties, pursuant to s. 113(2) of the Act, as the appellant failed to submit an accurate tax return. Dissatisfied with the SCIT's deciding order, the appellant appealed to the High Court, which upheld and affirmed the SCIT's deciding order. Hence, the present appeal. The issues that arose for adjudication were: (i) whether the appellant's annual allowances were exempt from income tax under the EO; and (ii) whether the respondent's imposition of penalties on the appellant was justified.

Held (allowing appeal in part)
Per Mohamed Zaini Mazlan JCA delivering the judgment of the court:

(1a) The provisions under s. 139(1)(b) of the Act were to be read disjunctively. The relevant provisions here were s. 139(1)(b)(ii) to (iii) and (c). The appellant owned 30% out of the 10,000 paid up shares, making him the largest shareholder among the nine shareholders in the company. The appellant, therefore, came under s. 139(b)(ii), (iii) and (c), as he would be entitled to: (i) receive the 'greater part' of any distribution of income under s. 138(b)(ii); or (ii) acquire the 'greater part' of the company's redeemable share capital assets in the event that the company is wound up and available for distribution among members under s. 139(b)(iii); or (iii) the greater part of the assets available among members should the company be wound up under s. 139(c). (para 26)

(1b) Although the appellant held only 30% of the issued capital, he was the largest single shareholder, as the remaining eight shareholders each held 5% or less. Control, under s. 139 of the Act, turned on comparative, not absolute ownership. Each shareholder's shares were to be treated independently and should not be combined, which essentially made the appellant the majority shareholder. (para 29)

(1c) The exemptions under para. 2 of the EO did not apply to the appellant as he fell under the conditions specified in para. 3, in conjunction with s. 139(b), (ii), (iii) and (c) of the Act. This meant that he was recognised as an employee who had control over the company due to his shareholdings. Because para. 3(a)(i) of the EO employed the same concept of 'control' and s. 139 supplied the controlling definition, the

two instruments must be read in *pari materia*. The deeming language 'shall be taken to have control' was conclusive. Once control was established, the allowances were not exempt from income tax. The appellant's appeal in respect of the notices of additional assessment for the years of assessment 2011 and 2012 was dismissed. (paras 31, 32 & 44)

(2a) The penalty in s. 113(2) of the Act was designed to punish taxpayers who intentionally submit incorrect returns or information rather than penalise innocent taxpayers. The appellant, however, did not intend to deceive the respondent by failing to declare the allowances for the years 2011 and 2012. The appellant's failure to declare the allowances was based on his interpretation of para. 3(a)(i) of the EO; he incorrectly believed that the allowances were exempt from tax. There was no indication that he sought to conceal the allowances or mislead the authorities. The SCIT and the High Court erred in failing to give proper weight to the *bona fide* nature of the appellant's conduct and the absence of precedent on the relevant point of law. No penalty should have been imposed on the appellant. (para 42)

(2b) The 45% penalty imposed, under s. 113(2) of the Act, was unsustainable. The respondent erred in law and acted unreasonably in failing to exercise discretion to remit the penalty under s. 124(3) of the Act. The penalty was therefore set aside. (para 43)

Case(s) referred to:

Chua Lip Kong v. Director-General of Inland Revenue [1981] CLJU 157; [1981] 1 LNS 157 PC ***(refd)***

International Naturopathic Bio-Tech (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2024] 2 CLJ 519 CA ***(refd)***

Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd [2023] 6 CLJ 350 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 13, 103

Income Tax (Exemption) Order 2009, paras. 3(a)(i), (b), (c)

Income Tax Act 1967, ss. 113(1), (2), 124(1), (2), (3), 138(b)(ii), 139(1)(b)(ii), (iii), (c), Schedule 5 para. 13

For the appellant - George Lim & Chew Peng Hui; M/s Battenberg & Talma
For the respondent - Ashrina Ramzan Ali & Surani Che Ismail; Inland Revenue Board of Malaysia

[Editor's note: For the High Court judgment, please see Lam Kam Wing v. Ketua Pengarah Hasil Dalam Negeri [2022] CLJU 1609; [2022] 1 LNS 1609 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mohamed Zaini Mazlan JCA:

Introduction

[1] This appeal is against the High Court's decision which had by way of case stated affirmed the deciding order of the Special Commissioner of Income Tax ('SCIT'). The SCIT had dismissed the appellant's appeal regarding the notices of additional assessment for the years of assessment 2011 and 2012.

[2] The primary issue in this appeal is whether the allowances received by the appellant, as an employee, are exempt from taxation, given that he owns a 30% share in the company and is considered by the respondent to have control over his employer. This appeal will require a determination of what it means to have control over a company through share ownership, as outlined in the Income Tax (Exemption) Order 2009 ('Income Tax (Exemption) Order 2009').

Facts

[3] Tasmanco Consultancy Services Sdn Bhd ('the company') provides tax consultancy services and has an issued and paid-up capital of 10,000 unit of shares. The appellant is the company's Managing Director and holds 3,000 (30%) of these shares.

[4] The company provided the appellant with travelling, petrol, parking, and meal allowances amounting to RM14,400 annually ('the allowances'). These allowances are central to this appeal.

[5] In March 2014, the respondent conducted an audit of the company's scheduled tax return for the years of assessment 2011, 2012 and 2013. During this audit, the respondent discovered that the company had not included the appellant's allowances in the scheduled tax return. The allowances in question are for the years 2011 and 2012, and are as follows:

Allowances	2011 (RM)	2012 (RM)
Food	7,200.00	7,200.00
Petrol	6,000.00	6,000.00
Parking	1,200.00	-
Telephone	-	1,200.00
Total	14,400.00	14,400.00

[6] The appellant contended that these allowances were exempt from income tax pursuant to para. 2 of the Exemption Order 2009. However, the respondent disagreed, asserting that the Exemption Order 2009 did not apply to the appellant under para. 3.

[7] The respondent issued 'additional assessment notices' dated 20 December 2015 for the assessment years 2011 and 2012. The additional tax payable by the appellant was RM5,011.20 for each assessment year, including a 45% penalty imposed under s. 113(2) of the Income Tax Act 1967 ('ITA 1967'). The appellant subsequently filed an appeal against the additional assessments to the SCIT using Form Q.

[8] The appellant's appeal was heard before a single commissioner. Only two witnesses testified: the appellant and an officer from the respondent's Kuching branch. Two issues were presented for determination:

(i) whether the appellant's annual allowances of RM14,400 received during the assessment years 2011 and 2012 are exempt from income tax under the Exemption Order 2009; and

(ii) whether the respondent's imposition of 45% penalty on the appellant under s. 113(2) of the ITA 1967 is justified.

[9] The SCIT ruled in favour of the respondent. The SCIT observed that although the allowances received by the appellant are generally exempt under the Exemption Order 2009, the appellant does not qualify for this exemption. This is because he is subject to para. 3(a) of the Exemption Order, which states that the exemption does not apply to employees who have control over their employer through ownership of shares in the company.

[10] The SCIT also determined that the respondent had the authority to impose penalties under s. 113(2) of the ITA 1967, as the appellant had failed to submit an accurate tax return. The SCIT also disagreed with the appellant's argument that the respondent could only reduce or waive the penalty under s. 124(3) of the same Act. The SCIT opined that this provision applies only in cases where prosecution has been instituted against the taxpayer, which was not applicable in this situation.

[11] The appellant, dissatisfied with the SCIT's deciding order, appealed to the High Court. On 17 March 2022, the High Court upheld the SCIT's findings and affirmed its decision. The learned Judicial Commissioner noted that the SCIT had established the following findings of fact:

> (i) The Appellant is a Managing Director of Tasmanco Consultancy Services Sdn Bhd ('Tasmanco') and holds shares of 3,000 units out of 10,000 units of general authorised capital issued in the company.
>
> (ii) On 25.03.2014, an Audit of Scheduled Tax Return ('STD') for years of assessment 2011, 2012 and 2013 was conducted upon Tasmanco which is the employer of the Appellant.
>
> (iii) As a result of the audit, it was found that the Appellant's employer had reported the Scheduled Tax Return ('STD') for the Appellant lesser than it should be for the years of 2011 and 2012. The reasoning is because the amount of STD deducted does not include allowances that has been given by the Appellant's employer to the Appellant.

(iv) Based on the Payroll Records of Employees and Directors for year of remuneration 2011 and 2012, the following are the allowances identified that have been given by the Appellant's employer to the Appellant *ie*, Elaun Makan = RM7,200.00, Elaun Petrol = RM6,000.00, Elaun Letak Kereta = RM1,200.00 and Elaun Telefon = RM1,200; making it a total of RM14,400.00 for each year of 2011 and 2012.

(v) The Appellant claimed that the income was tax-exempt under the Income Tax (Exemption) Order 2009 (P.U.(A)152/2009) hence the income was not reported as the allowances received in the YAs 2011 and 2012.

(vi) The result of the audit examination was informed to the Appellant's employer *via* letter dated 10.07.2014 that there was an offense committed by the Appellant's employer, *ie*, the lack of amount of STD that should have been deducted against Appellant.

(vii) *Via* letter dated 24.07.2014 the Appellant's employer informed that he did not agree with the audit findings and requested the basis of calculation of STD provided by the Respondent *via* letter dated 31.07.2014.

(viii) The response from the Respondent *via* a letter dated 11.08.2014 was that the Exemption Order did not apply to the Appellant by virtue of paragraph 3 Non-application of the Exemption Order.

(ix) *Via* Appellant employer's letter dated 21.08.2014, the Appellant disagree with the reason given by the Respondent and stated that the Exemption Order applies to him on the grounds that he has no control over the Appellant's employer's company.

(x) Respondent through letter dated 13.01.2015 reminded the offense committed by the Appellant's employer and the Appellant's employer to submit additional information for further review.

(xi) The Appellant *via* the employer's letter dated 21.1.2015, stated that Paragraph 3 Non-application of the Exemption Order is not applicable to the Appellant based on the reasons previously informed.

(xii) The Respondent issued Additional Assessment Notice (JA) to the Appellant for the YAs 2011 and 2012, dated 10.12.2015 with a total additional tax payable of RM5,011.20 including penalties imposed under subsection 113(2) ITA 1967 for each year of assessment.

(xiii) The Appellant filed an appeal through Form Q dated 21.12.2015 against the Additional Assessments raised and received by the Respondent on 29.12.2015.

[12] The learned Judicial Commissioner referred to the cases of *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] CLJU 157; [1981] 1 LNS 157; [1982] 1 MLJ 235 and *Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923. In these cases, the courts held that the findings of facts made by the SCIT are final and cannot be challenged, allowing only questions of law to be raised in appeals to the High

Court. The learned Judicial Commissioner concluded that the court could only interfere if there were a misconception of the law that was not supported by the facts, and that there were none in this case.

[13] With respect, we are of the view that the learned Judicial Commissioner did not consider the appellant's arguments satisfactorily and had only concluded that the wording of para. 3 of the Exemption Order 2009 is unambiguous in dismissing the appellant's appeal. It is incumbent upon us to thoroughly consider the appellant's argument in this appeal.

The Appeal

[14] The appellant has decided to abandon one of his grounds for appeal, specifically concerning whether his appeal before the SCIT should have been heard by three Special Commissioners.

[15] The only two issues present in this appeal are as follows:

(i) whether the appellant's annual allowances of RM14,400 received during the assessment years 2011 and 2012 are exempt from income tax under the Exemption Order 2009; and

(ii) whether the respondent's imposition of penalties on the appellant under s. 113(2) of the ITA 1967 is justified.

We will address each issue in turn.

Whether The Appellant's Allowances Are Exempted

[16] An employee is usually exempted from income tax on benefits or gifts received from their employer, as stipulated under para. 2 of the Exemption Order 2009:

> Exemption
>
> 2. (1) The Minister exempts an employee from the payment of income tax in relation to the benefit or gift specified in the Schedule which is received by such employee from his employer in ascertaining gross income from his employment in the basis period for a year of assessment.
>
> (2) The benefit and gift referred to in subparagraph (1) shall be such benefit and gift that are generally provided to all employees.
>
> (3) The exemption granted to an employee under subparagraph (1) for the following benefit shall be subject to the limits as specified:
>
> (a) the travelling allowance, petrol card, petrol allowance or any of its combination, for travelling to and from home to the place of work shall not exceed RM2,400.00 per year;
>
> (b) the travelling allowance, petrol card, petrol allowance or toll payment or any of its combination, for travelling in the performance of employment at a place other than his place of work, shall not exceed RM6,000.00 per year;

(c) the child care allowance shall not exceed RM2,400.00 per year;

(d) the discounted price for consumable business products of the employer shall not exceed RM1,000.00 per year; and

(e) the amount of subsidy on interest of housing, education or car loan shall be determined in accordance with the following formula:

...

[17] Paragraph 2 of the Exemption Order 2009 establishes a general rule, namely, benefits-in-kind and cash allowances of the types enumerated in the Schedule are excluded from the payment of income tax when provided to an employee. The appellant's meal, petrol, parking and telephone allowances plainly fall within those categories and, but for para. 3, would be exempt. The exemption under para. 2 does not apply where an employee has control over his employer. This exception is set out under para. 3(a)(i), which states as follows:

3. Non-application

This Order shall not apply to an employee where the employee has control over his employer in the following manner:

(a) *where his employer is a company, the employee has the power to secure that the affairs of the company or any other company that has control over his employer are conducted in accordance with the wish of the employee in the following manner*:

(i) *by means of the holding of shares in the company or such other company*;

(ii) the possession of voting power in relation to the company or such other company; or

(iii) by means of any power conferred by the articles of association or other document regulating the company or such other company;

(b) where the employee is the employer's partner in a partnership; or

(c) where the employee is a sole proprietor, the employee and employer is the same person.

(emphasis added)

[18] The operative word is "control". In the appellant's case, the respondent contended that the appellant comes under para. 3(a)(i) as he holds shares in the company and is therefore considered to have the power to ensure that the company's affairs are conducted according to his wishes. It is undisputed that the appellant holds a 30% share in the company. Whether the appellant, as a 30% shareholder wields such control is the pivotal question.

[19] The appellant refuted the claim that he had control over the company for several reasons. He highlighted that there were nine other shareholders and that owning 30% of the shares was not enough for him to dictate how

the company's affairs were managed. The appellant referred to arts. 51 and 80 in the company's articles of association, which state that resolutions presented for a vote at the company's general meetings shall be decided by a majority of votes, with the chairman holding a casting vote in the event of a tie. He emphasised that he had no control at a shareholders' meeting, as he was only one of nine shareholders. Additionally, the appellant stated that conventionally, a 51% shareholding is required to gain control in a private company where each share carries one vote at a general meeting. The appellant maintained that he had no power to control the company's affairs.

[20] The SCIT concluded that the wordings of para. 3(a)(i) are unambiguous and should be interpreted strictly, which meant that the appellant is deemed to have control by holding shares in the company.

[21] The SCIT also disagreed with the appellant's contention that the onus lies on the respondent under s. 103 of the Evidence Act 1950 ('EA 1950'), to prove that he falls under the provision of para. 3(a)(i). The SCIT determined that the burden of proof lies with the appellant, by virtue of para. 13 Schedule 5 of the ITA 1967, which states:

> Onus of proof
>
> 13. The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the appellant.

[22] We will begin by discussing the burden of proof in appeals before the SCIT. The appellant is partially correct in stating that the burden of proof lies with the party asserting a fact, as set out in s. 103 of the EA 1950. It is a well-accepted principle that the burden typically falls on the one who makes the assertion. However, it is trite law that a specific rule takes precedence over a general rule. Paragraph 13 of Schedule 5 of the ITA 1967 squarely places the burden of showing that an assessment is "excessive or erroneous" on the taxpayer. Paragraph 13, being a specific provision, overrides the general rule in s. 103 of the EA 1950. This responsibility remains with the taxpayer at every stage, including appeals to the High Court and the appellate courts. This principle was restated recently in *International Naturopathic Bio-Tech (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2024] 2 CLJ 519 at p. 539.

[23] We now turn to the primary issue, namely whether the appellant's allowances are exempted from tax. The food, parking, telephone and petrol allowances received by the appellant are exempted from income tax under para. 2 of the Exemption Order 2009. However, this exemption does not apply to an employee who has control over their employer. The circumstances under which an employee is deemed to have control over their employer are specified in paras. 3(a), (b), and (c) of the Exemption Order 2009.

[24] The pertinent issue is whether the appellant, who holds a 30% share in the company's paid-up capital, falls under para. 3(a)(i) of the Exemption Order 2009. In reaching its decision, the SCIT took a literal interpretation of para. 3(a) and concluded that the appellant has control over the company due to his shareholding. However, the SCIT did not consider whether a 30% shareholding actually gives the appellant control over the company's affairs.

[25] The ITA 1967 provides guidelines for determining when a person is considered to have control of a company. These guidelines are set out under s. 139 which appears to have been overlooked by parties involved in this case. For the avoidance of doubt, s. 139 applies to any provisions in the ITA 1967 as it commences with the words "for the purposes of this Act ...". The relevant provision for this case is s. 139(1), which states as follows:

> Section 139 Controlled companies
>
> (1) *For the purposes of this Act, a person shall be taken to have control of a company:*
>
> (a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company's affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;
>
> (b) *if he possesses or is entitled to acquire either:*
>
> (i) the greater part of the issued share capital of the company;
>
> (ii) *such part of that capital as would, if the whole of the income of the company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or*
>
> (iii) *such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members;* or
>
> (c) *if in the event of a winding up he would be entitled to the greater part of the assets available for distribution among members.*
>
> (emphasis added)

[26] The provisions under s. 139(1)(b) are to be read disjunctively. The relevant provisions here are s. 139(1)(b)(ii) to (iii) and (c). The appellant owns 30% out of the 10,000 paid-up shares, making him the largest shareholder among the nine shareholders in the company. The appellant therefore comes under s. 139(b)(ii), (iii) and (c), as he would be entitled to:

(a) receive the "greater part" of any distribution of income under s. 138(b)(ii); or

(b) acquire the "greater part" of the company's redeemable share capital assets in the event that the company is wound-up and available for distribution among members under s. 139(b)(iii); or

A (c) the greater part of the assets available among members should the company be wound-up under s. 139(c).

[27] The keywords in ss. 139(b)(ii), (iii), and (c) are "the greater part." Since the appellant owns 30% of the company's paid-up shares, he is clearly the largest shareholder. Under these sections, he would be entitled to the B greater part of the company's assets if the company decides to distribute its income or is wound up. Therefore, it is evident that the appellant falls within the definition outlined in s. 139 of the ITA 1967 and is considered, for the purposes of the Act, to be a person who has control over the company.

C **[28]** The appellant argued that only a shareholding of 51 % or more grants control over a company's affairs, claiming that his 30% shareholding is insufficient for such control. He implied that the other shareholders would collectively have control since their combined shareholdings exceed 51%.

[29] Although the appellant holds only 30% of the issued capital, he is the D largest single shareholder, as the remaining eight shareholders each hold 5% or less. Control under s. 139 of the ITA 1967 turns on comparative, not absolute ownership. Each shareholder's shares are to be treated independently and should not be combined, which essentially makes the appellant the majority shareholder.

E **[30]** A similar issue arose before this court in *Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd* [2023] 6 CLJ 350, where s. 139 of the ITA 1967 was also considered. The salient parts of the judgment is as follows:

> Whether The Respondent And ELL Are Associated Persons
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> F [53] In any event, we agree with the respondent that the DGIR cannot invoke s. 140A(5A) as the same only took effect on 1 January 2019. For the purpose of the word "control" under s. 140A(5)(c) of the ITA, the relevant provision is s. 139 of the ITA, which reads as follows:
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> (1) For the purposes of this Act, a person shall be taken to have control of a company:
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> G
>
> (a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company's affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;
>
> H
>
> (b) if he possesses or is entitled to acquire either:
>
> (i) the greater part of the issued share capital of the company;
>
> (ii) such part of that capital as would, if the whole of the income of the company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or
>
> I

(iii) such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members; or

(c) if in the event of a winding up he would be entitled to the greater part of the assets available for distribution among members.

[54] Under s. 139 of the ITA, a person is deemed to acquire control over the company affairs upon the occurrence of any one of the two situations:

(i) if he possesses or is entitled to acquire the greater part of the share capital in the company; or

(ii) if he possesses or is entitled to acquire the voting power in the company.

[55] In this case, the facts clearly shows that the majority of shares in the respondent belongs to Ensco Oceanics Company LLC with 980,000 ordinary shares, which make up 49% of the total shares. The remaining 51% of shares were held by three different local companies, namely, Pacific Reward Sdn Bhd (3%), Crimson Bay Sdn Bhd (24%) and Prominent Vision Sdn Bhd (24%).

[56] *Therefore, even though the local companies held a total of 51% cumulatively, each of them held less shares than the Ensco group. As such, we are of the considered opinion that the learned judge had failed to consider the fact that the three local shareholders only hold 3%, 24% and 24% respectively in the respondent. The learned judge has erred in law and in fact when she literally combined the shareholding by the three different and separate entities in the respondent, in order to make a finding that a related company, Ensco Oceanics Company LLC is not a majority shareholder of the respondent*. It is not for the learned judge to arbitrarily make a finding based on 51% shareholding for control within s. 139, as this is not specifically provided for in s. 139 itself.

[57] As the three local companies are separate entities, each holding 3%, 24% and 24% of the shares respectively, they cannot be said to have control over the respondent as decided by the learned judge in her judgment. The learned judge had absolutely disregarded the 49% shares held by the Ensco group as the real majority shareholder of the respondent company, and this is in line with s. 139 of the ITA.

[58] In any event, we are also of the considered opinion that the issue of control is not just a legal issue but a factual issue as well. The issue of control is not just limited to 51% shareholding control as submitted by the respondent and accepted by the learned judge. Section 139 provides several circumstances of control, including if the company possesses or is entitled to acquire the greater part of the share capital in the company or if the company possesses or is entitled to acquire the voting power in the company. The voting rights are factual issues which are best left to the SCIT.

[31] The exemptions under para. 2 of the Exemption Order 2009 do not apply to the appellant. This is because he falls under the conditions specified in para. 3, in conjunction with s. 139(b)(ii), (iii), and (c) of the ITA 1967. This means that he is recognised as an employee who has control over the company due to his shareholdings. Because para. 3(a)(i) of the Exemption Order 2009 employs the same concept of "control", and s. 139 supplies the controlling definition, the two instruments must be read in *pari materia*. The deeming language "shall be taken to have control" is conclusive. The court cannot rewrite it by introducing an arbitrary 51% benchmark. The appellant's reliance on company law principles of majority voting is misplaced, as s. 139 serves as a revenue rule aimed at substance rather than corporate formalities.

[32] The SCIT adopted a literal approach to para. 3 and reached the correct result, *albeit* without traversing s. 139 of the ITA 1967. Our analysis fortifies that conclusion on firmer statutory ground. Once control is established, the allowances are not exempt from income tax.

Penalty

[33] The appellant challenges the imposition of the 45% penalty under s. 113(2) of the ITA 1967, contending that the penalty was wrongly levied on the basis that he had allegedly failed to declare the relevant allowances and thereby furnished an inaccurate return. The appellant asserted that these allowances were duly recorded in the company's "Employer's Payroll Records of Employees and Directors" and that there was no intention to conceal them. Relying on the case of *Office Park Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2011] 9 MLJ 479, the appellant argued that s. 113(1) and (2) of the ITA 1967 are penal provisions aimed at taxpayers who deliberately submitted incorrect tax return and information. He contends that Parliament did not intend to punish taxpayers for unintentional errors or *bona fide* interpretations of the law. Furthermore, the appellant contended that the issue evolves around a legal interpretation of para. 3(a)(i) of the Exemption Order 2009 and emphasises that he did not intentionally mislead the respondent. The appellant added that he had fully cooperated with the respondent.

[34] The appellant additionally submitted that the respondent had no statutory basis to reduce the quantum of the penalty to 45% unilaterally. He argued that s. 113(2) of the ITA 1967 authorises only the imposition of a penalty equivalent to the tax undercharged and that any remission or reduction must proceed strictly under s. 124(3) of the ITA 1967. The appellant exhorted that abatement or remission of the penalty can only be carried out in accordance with s. 124(3) of the ITA 1967, and not unilaterally, as the respondent had done in this instance. That section, the appellant contends, requires a written admission of wrongdoing before any penalty can be compounded, abated or remitted. As no admission was made,

the appellant contended that the respondent had no authority to impose the penalty. Consequently, he argued that the penalty imposed was illegal, null, and void.

[35] The applicable statutory framework must be considered. Since no criminal proceedings were instituted against the appellant, the relevant provision in the ITA 1967 is s. 113(2), and not s. 113(1). The latter applies only where charges are brought before a court. Section 113 is as follows:

> 113 Incorrect returns
>
> (1) Any person who:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.
>
> (2) Where a person:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, **the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in** consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty **(or, where the penalty is abated or remitted under subsection 124(3)**, so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).
>
> (emphasis added)

[36] Section 113(2) of the ITA 1967 empowers the Director General ("DG") to impose a penalty equal to the amount of tax undercharged where no prosecution has been commenced. The use of the word "may" vests discretion in the DG. However, the DG imposed only 45% of the maximum penalty that could have been assessed against the appellant. The respondent stated that this rate was fair and reasonable, based on the facts and circumstances of the case. The respondent also contended that the reduction was not a result of s. 124(3) of the ITA 1967, as there was no prosecution against the appellant and that s. 124 of the ITA 1967 is not relevant to this case.

[37] Contrary to the appellant's contention, s. 113(2) of the ITA 1967 does not prohibit partial penalties, nor does it require the DG to impose the full amount. Section 113(2) of the ITA 1967 states that the penalty that the DG may require the taxpayer to pay "... a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under sub-s. 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under sub-s. (1)". This means the DG has the discretion to abate or remit the penalty imposed on a taxpayer under s. 124(3) of the ITA 1967.

[38] Section 124 of the ITA 1967 reads as follows:

> 124 Power to compound offences and abate or remit surcharge or penalties
>
> (1) Where any person has committed any offence under this Act, the Director General may at any time **before conviction compound the offence** and order that person to pay such sum of money, not exceeding the amount of the maximum fine and any special penalty to which that person would have been liable if he had been convicted of the offence, as he thinks fit:
>
> Provided that the Director General shall not exercise his powers under this section unless that person in writing admits that he has committed the offence and requests the Director General to deal with the offence under this section.
>
> (2) Where under this section the Director General compounds an offence committed by any person and makes an order accordingly:
>
> (a) the order shall be made in writing under the hand of the Director General and there shall be attached to it the written admission and request referred to in subsection (1);
>
> (b) the order shall specify:
>
> (i) the offence committed;

(ii) the sum of money ordered to be paid; and

(iii) the date on which payment is to be made or the dates on which instalments of that sum are to be paid, as the case may be,

and, where the order provides for payment by instalments and there is default in payment of any instalments, the whole of the balance then outstanding shall become due and payable forthwith;

(c) a copy of the order shall be given, if he so requests, to the person who committed the offence;

(d) that person shall not be liable to any prosecution or, as the case may be, any further prosecution in respect of the offence and, if any such prosecution or further prosecution is brought, it shall be a good defence for that person to prove that the offence has been compounded under this section;

(e) the order shall be final and shall not be subject to any appeal;

(f) the order may be enforced in the same way as the judgment of a subordinate court (as defined in Schedule 5) for the payment of the amount stated in the order or the amount outstanding, as the case may be; and

(g) the order shall, on production to any court, be treated as proof of the commission of the offence by that person and of the other matters set out therein.

(3) **The Director General may abate or remit any surcharge or penalty imposed under this Act except a penalty imposed on conviction**.

(emphasis added)

[39] Under s. 124(1) of the ITA 1967, the DG may, at any time before a person is convicted of an offence under ITA 1967, compound the offence. This allows the DG to order the individual to pay an amount not exceeding the maximum fine along with any special penalties they would have faced if convicted, provided that the individual has admitted in writing to committing the offence. Section 124(2) outlines the procedures that follow the compounding of the offence and its effects. Therefore, ss. 124(1) and (2) should be read together and apply only when action has been initiated against the individual in court. This requirement stems from the use of the term "conviction" in s. 124(1). It is correct that this remission was not done under s. 124(1) or (2), as those apply only when an offence is compounded prior to conviction, which is not the case here

[40] Nonetheless, the respondent's assertion that s. 124 of the ITA 1967 is irrelevant is overstated. Section 113(2) of the ITA 1967 expressly contemplates abatement or remission "under sub-s. 124(3)". That provision allows the DG to "abate or remit any surcharge or penalty imposed under this Act except a penalty imposed on conviction." Section 124(3) ITA 1967 operates independently of s. 124(1) to (2) of the ITA 1967 and does not require a written admission of guilt. This provision does not incorporate the

A procedural preconditions in s. 124(1), (2) of the ITA 1967, such as a written admission. It applies to all penalties not arising from criminal convictions, including those imposed under s. 113(2) of the ITA 1967. This is therefore the relevant section for the appellant's case as the DG is vested with the discretion to remit or abate, or in much simpler terms, cancel or reduce, any
B penalty that has been imposed on a taxpayer. The DG was therefore entitled to charge a penalty under s. 113(2) of the ITA 1967 and reduce it under s. 124(3) of the ITA 1967.

[41] The key issue to consider is whether the 45% penalty imposed is excessive. The penalty provision in s. 113(2) of the ITA 1967 is designed to
C punish taxpayers who intentionally submit incorrect returns or information rather than to penalise innocent taxpayers. This principle was established in the case of *Office Park Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (*supra*). The SCIT determined that the 45% penalty was "just and correct" as the appellant's inaccurate return would not have been discovered
D if the respondent had not conducted an audit.

[42] The appellant did not intend to deceive the respondent by failing to declare the allowances for the years 2011 and 2012. The appellant's failure to declare the allowances was based on his interpretation of para. 3(a)(i) of the Exemption Order 2009. He believed, *albeit* incorrectly, that the
E allowances were exempt from tax. There is no indication that he sought to conceal the allowances or mislead the authorities. Indeed, the case turns on a novel and untested construction of a statutory exemption clause. That fact should have weighed heavily in the respondent's exercise of discretion. The appellant should be given the benefit of the doubt. The SCIT and the High
F Court erred in failing to give proper weight to the *bona fide* nature of the appellant's conduct and the absence of precedent on the relevant point of law. We are therefore of the view that no penalty should have been imposed on the appellant.

[43] For these reasons, we find that the 45% penalty imposed under
G s. 113(2) of the ITA 1967 is unsustainable. The respondent erred in law and acted unreasonably in failing to exercise discretion to remit the penalty in full under s. 124(3) of the ITA 1967. The appellant's return, though incorrect, was not fraudulent or dishonest. The penalty is therefore set aside.

Conclusion

H

[44] The appellant's appeal is allowed in part. The appellant's appeal in respect of the notices of additional assessment for the years of assessment 2011 and 2012 is dismissed. The penalty imposed on the appellant however is set aside. We make no order as to costs.

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